

Risk Watch Article

A foul ball leads to a foul result. How you can overcome that.



As you may know, public school buildings and their grounds are now “Civic Centers.” See HB 332 (codified at Utah Code Ann. § 53A-3-413, -414). This bill passed in the recent legislative session “requires all public school buildings and grounds to be made available as a civic center to district residents for supervised recreational activities and meetings.” Id. The bill further provides that “a local school board may not refuse the use of a civic center, for other than school purposes, unless it determines that the use interferes with a school function or purpose.” Id.

You may ask, so? We let the community use our school buildings and grounds anyway because we are good citizens. (For state agencies, it also is not uncommon that State buildings are used by the public for various activities.) The difference now is that you no longer have a choice, use is required and you have to have policies in place for the use of civic centers. See Utah Code Ann. § 53A-3-414(2)(b) (A local school board “shall adopt policies for the use of civic centers”). The policies put into place, and the procedures implemented, are very important to control the liability that arises with use of school buildings. Risk Management has seen a number of practices in the past that look good on paper but don’t lessen liability. Most common among these is making sure you obtain a certificate of insurance but not an indemnity agreement. The policies you adopt should address this issue by requiring that users of buildings sign an indemnity agreement in addition to providing a certificate of insurance.

Let’s take a specific example (it’s real but the names have been changed to protect the innocent). The Really Awesome District (“RAD”) has a baseball field. It lets the local Little League use the field. During an evening Little League game after the school was closed and with no school involvement whatsoever a foul ball left the field and hit a passing motorist driving on the adjacent street in his convertible—Mr. Ouch. Mr. Ouch filed a claim seeking to recover for personal injury.

RAD was not worried, they had obtained a Certificate of Insurance from the Little League showing it had \$2,000,000 in insurance. The claim was sent to Risk Management which forwarded the claim on to Little League’s insurer. Big Insurer wrote back: “While you have provided a copy of a Certificate Of Insurance issued to [RAD], this certificate provides your insured with no coverage under our insured’s policy. We remind you that Certificates of Insurance issued by producing insurance agents do not afford coverage in any fashion....” In English, Big Insurer was saying that they insured the Little League not RAD, so the school district had no coverage itself from Big Insurer and the Certificate of Insurance was essentially useless.

Big Insurer then explained that despite the fact that a Little League player had hit the ball at a Little League game when no one from the school district was even present, fault lay with the school district who apparently should never have let Little League use its field: “Our investigation has determined that the baseball diamond at [RAD] high school was unsafe at the time of this incident. The fencing was poorly designed and did not prevent foul balls from

leaving the ballpark and entering the street next to the park. Because of this, a foul ball entered the street and struck the claimant....”

Big Insurer then added insult to injury, it was going to make a, presumably small, offer of settlement to Mr. Ouch on behalf of Little League “in an attempt to obtain a release and prevent our insured from being involved in any future legal action. ... [W]e will not provide any coverage for your client in this matter and will also not provide a defense if your client is sued.” So RAD was left holding the ball, or in this case the bat, without the benefit of the insurance it thought would protect it.

How could RAD have avoided this? By obtaining an indemnity agreement from Little League. An indemnity agreement provides that the user of the field will defend RAD and indemnify it (pay) for all damages, claims and lawsuits arising out of or in any way connected with the use of the facilities except such that result from the sole negligence of the school district. Again, in English an indemnity agreement says that if you are going to use our facilities you can pay if something happens as a result of that use that gets us sued. The only exception is where there is no fault of the user at all. In the above example, Little League was at fault in at least some small way such as using the field despite the fact that foul balls could leave the field and enter the street or not waiting to bat until no cars were coming. With an indemnity agreement in place, Little League and their insurer would pay Mr. Ouch’s claim.

Jordan School District has a form titled Application For Use of School Facilities & Users Agreement with a good indemnity clause. See also, Jordan’s website which sets forth its procedures on facility use and rental guidelines at <http://www.jordandistrict.org/general/facilityrental.htm> and contains a link to its policies. (Note that the information is copyrighted by Jordan.)

A certificate of insurance is also needed, it shows that a user of facilities, like Little League, can honor the indemnity agreement.¹ Insurance is important for private users because they may not have the assets to back up an indemnity agreement. (Risk does not require other governmental entities to have private insurance to back up indemnity agreements, we assume they are solvent.) However, it is the indemnity agreement that makes the user take responsibility when claims are made against the school district arising out of a user’s use. The requirement to sign indemnity agreements should be a central feature of your policies developed in accord with the new law.

¹Risk Management has made arrangements with the Rob A. Moreton Company to allow private users of your buildings access to event insurance at very reasonable rates, as low as one or two hundred dollars. Let private users know about this and that they can contact Nadine Guss at (801) 715-7125 to obtain insurance for private functions in school buildings or on the grounds.